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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/926,586
Filing Date: November 21, 2001
Appellant(s): BERGGREN ET AL.

MAILED

SEP 13 2005

GROUP 1700

Daniel J. Pereira, Ph.D.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8-1-05 appealing from the Office action mailed 12-29-04.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

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The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

Claim 18 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,051,236	PORTMAN	4-2000
US2002/0090416	CONNOLLY	7-2002
WO 89/08405	MOLIN ET AL.	9-1989

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WO 98/46091

KURPPA

10-1998

1098/05343

MASUYAMA

12-1998

Wilkes, A. "Diet and Performance Beverages Respond to Increased Demands, 10-1992, Food Product Design, com/archive/1992/1092DE.html.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 15, 25, 36, 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Connolly (US 2002/0090416 A1) view of Kurppa (WO 98/46091).

Connolly discloses that it is known as in claim 15 to use probiotic bacteria to enhance metabolic processing from the gastrointestinal tract using acidophilus bacteria or other lactic acid producing bacteria (abstract). The probiotic organisms such as LB plantarium, and acidophilus can help repair and maintain healthy intestinal linings (page 3, para. 0032-0036 and 0037). The product can be seen as a sports drink because it can be used by athletes, (para. 001 and page 4, 0070) and absent any other ingredients, could be considered a sports drink because the reference discloses a liquid and the claimed bacteria. Claim 15 differs from the reference in the use of particular

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micronutrients. However, Kurppa discloses a sports drink and powder, which contains micronutrients such as potassium chloride and magnesium sulfate and other conventional ingredients found in a sports drink (abstract and page 5, Ex. 2). Therefore, it would have been obvious to use known conventional ingredients in the composition of the above reference to make a sports drink because sports beverages can contain protein and lactobacilli as disclosed by Connolly.

Claim 25 is to a method of treating various gastrointestinal disturbances. However, as the claimed sports drink has been disclosed above, the various gastrointestinal disturbances would have been alleviated as the particular composition has been shown. Therefore, it would have been obvious to alleviate various symptoms by using a lactobacilli (LB) for its known functions.

Claims 36 and 37 require particular lactobacilli with particular deposit numbers. Connolly discloses the use of LB plantarum (page 3, 0035, last line). Nothing new is seen in the particular strain of plantarum absent anything new or unexpected. Therefore, it would have been obvious to use a known LB in the claimed sports drink.

Claims 16, 19-21, 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Molin (WO 89/08405) and Wilkes (Food Product Design).

Claim 16 further requires particular bacteria. Molin discloses a health drink that contains lactobacilli bacteria. The reference discloses that the composition is good for racehorses, which have something in common with athletes in needing particular foods to enhance endurance when running (abstract and page 2, lines 10-18). Connolly

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discloses the particular bacteria. Micronutrients as in claim 15 are disclosed on page 8 of Molin. Wilkes discloses that it is known to use minerals in beverages to improve athletic performance, page 1, and page 5, para. 2. Therefore, it would have been obvious to use lactic acid producing bacteria and micronutrients in the composition of the combined references because Connolly discloses that bacteria, which give a positive effect on the mucosa are known and can be used to enhance the health of athletes, and Molin discloses that it is known to use micronutrients in a health drink and sports drinks are also health drinks. Therefore, it would have been obvious to add micronutrients as disclosed by Molin to the beverage of Connolly, since they are known to be used in health drinks.

Claim 19 requires proteins and amino acids and claim 20 whey proteins. Proteins are well known in sports drinks, hence, large containers using particularly whey proteins are seen at health food stores. Connolly discloses the use of proteins in a beverage for athletes (col. 1, par. 0009). Also, Kurppa discloses the use of the amino acid, glutamic acid in a sports drink (page 5, lines 7, in ex. 2). Therefore, it would have been obvious to use proteins and amino acids in the claimed beverage.

Claims 21 and ~~29~~ 29 require low glycemic type carbohydrates and optionally high glycemic index carbohydrates. This covers all carbohydrates. It would have been within the skill of the ordinary worker to use either one as the function of each type of carbohydrates in providing quick energy or long-term energy is well known. Therefore, it would have been obvious to use known types of carbohydrates in the claimed composition.

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Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims and further in view of Masuyama (WO98/05343).

Claim 24 further requires the use of freeze dried lactobacilli with micronutrients in tablet form. Masuyama (WO98/05343) discloses that it is known to lyophilize (freeze-dry) lactobacillus and to form it into tables (page 9, lines 10-14). Therefore, it would have been obvious to treat lactobacilli as claimed in the composition of the combined references.

Claims 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combination of references as applied to the above claims, and further in view of Portman (6,051,236).

Claims 22 and 23 further require additional ingredients to make a beverage. Connolly discloses the use of milk protein or any other related protein along with probiotic bacteria, which have a positive effect on the intestinal mucosa as above (page 1, para. 0007-0009). The claims do not exclude the use of even milk protein, because whey is a part of milk. Portman discloses the use of whey protein in sports beverages with ingredients within the claimed amounts except for the lactobacillus (col. 9, lines 40-65). Connolly discloses high levels of the claimed bacteria, which could amount to the amount claimed depending on the amount taken (page 1, para. 0001 and col. 5, claim 15). Therefore, it would have been obvious to make a sports beverage containing the claimed ingredients as shown by Portman and to combine it with the beverage of

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Connolly because Connolly discloses that it is known to use the claimed bacteria in a sports beverage.

ARGUMENTS

(10) Response to Argument

Appellants argue that the reference to Connolly as a sports drink is mischaracterized, but that it is to a powdered preparation of milk protein with probiotic bacteria. This is not seen because the powdered product can be mixed with water to make a beverage (page 4, 0070). It is noted that appellants' claims do not contain any amounts of water other than to say that the product is a "sports drink". The reference discloses that "sports nutrition" is concerned with proteins which are required to build muscle (0001), (0002), (0008).

Appellants argue that there is no reason to combine Connolly with Kurrpa. However, both references are concerned with sports nutrition and the claims are open, comprising types of claims that do not exclude other ingredients. One would add a product containing lactobacilli to a sports drink because it promotes good intestinal health and the problem of proteins is seen as a problem in the sports nutrition area, and one would add vitamins and minerals to a sports beverage, for their known functions of promoting health.

Appellants argue that Connolly does not suggest the Lactobacilli as claimed or suggest that they have a positive effect on the human and intestinal mucosa. This is not seen because the abstract specifically says that "incorporating probiotic bacteria to enhance metabolic processing from the gastrointestinal tract and utilization in the body,

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and such probiotic organism preferably include bifido bacteria combined with acidophilus bacteria or other lactic acid producing bacteria". It is well known that Lactobacilli are "lactic acid producing bacteria" (abstract and 0009). Certainly, enhancing protein absorption from the gastrointestinal tract" is "having a positive effect on the intestinal mucosa" as is improving overall digestive health (page 2, 0010, last sentence, and 0011).

Appellants argue that the cited combination of references does not suggest the advantages of the claimed sports drinks, which is that adding the lactobacillus does not affect the other ingredients. However, Connelly discloses that the powdered preparation can be added to milk, water, juice in any amount and does not cite any problems with adding the bacteria. In fact, nothing has been shown in the prior art that adding lactobacilli to beverages would create a problem.

Appellants argue as to claim 25 that the combination of Connolly and Kurppa would not provide the necessary disclosure for people with the claimed gastrointestinal disturbances. However, Connelly recognizes that diets high in protein create problems of degraded digestive systems and poor absorption of nutrient which can be deleterious to the intestine (0004) and describes how the different bacteria choke out bad organisms so beneficial ones can proliferate. Poor absorption of foods can of course make for gastrointestinal disturbances.

Appellants argue that the reference to Mollin describes a health drink for horses. This is not seen as the abstract discloses that the composition can be a health drink for patients and also if it contains fermented oats, suitable for horses (page 2, lines 18-20).

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The claimed bacteria as in claims 16 are disclosed (page 4, lines 14-20). The particular bacteria with numbers as in claim 36 are not disclosed, however, it would have been within the skill of the ordinary worker to find the exact suitable bacilli absent anything new or unobvious from choosing the claimed ones. The reference teaches that the composition containing lactobacteria can also contain minerals and vitamins (page 4, lines 36, 37). As to the positive effect on the human mucosa, the reference states that "one medical problem in major operations of the abdomen is the general collapse of the organs due to infections from the large intestine and that the patient's intestinal flora can be disturbed in patients especially due to antibiotics (page 1, lines 6-23, page 2, lines 5-10). Certainly, keeping the large intestine healthy which of course contains the intestinal mucosa is the same thing.

As to Wilkes, the reference does disclose the use of minerals in beverages (page 1, and page 5, para. 2) to improve athletic performance.

Appellants argue that claim 24 is to a tablet and that Masuyama is just to forming tablets. However, the reference discloses that it is known to tablet fermented milk made with lactobacillus (abstract). As shown above the lactobacilli do have a positive effect on the human intestinal mucosa.

Appellants argue that Portman does not show that lactobacilli have a positive effect on the human intestinal mucosa. However, it was used in combination to show that it is known to use whey protein in sports beverages. The further amounts are disclosed by the reference in Table C, col. 9 as in claims 22 and 23 except for the lactobacillus.

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Therefore, it is seen that the references in combination show making a sports drink containing lactobacillus and the other known sports drink ingredients or why the claims would have been obvious.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Helen Pratt, Primary Examiner, Art Unit 1761.

Helen Pratt 8-31-05

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